NO. 91-1819

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In the Supreme Court of the United States

OCTOBER TERM, 1991

LAGRANGE TRADING COMPANY,
d/b/a AIRLINE BOOKSTORE
Petitioner

vs.

NICKY NICOLOSI,
AARON BROUSSARD,
CITY OF KENNER, LOUISIANA
Respondents

Opposition to Petition for Writ of *Certiorari* to the United States Court of Appeals for the Fifth Circuit

OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Did the courts below err in finding that City of Kenner Ordinance No. 6333, a content-neutral time, place and manner zoning regulation, was designed to serve a properly supported governmental interest in a narrowly tailored manner which did not unreasonably limit alternative avenues of communication to an adult bookstore?

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SUPPLEMENTATION OF STATEMENT OF THE CASE

Respondents do not suggest that Petitioner has misstated any fact. However, because Petitioner's Statement of the Case contains some factual characterizations and conclusions, and some relevant facts are omitted, Respondents respectfully supplement the Statement as follows:

I.

Petitioner's business, Airline Bookstore, displays and sells videos, tapes, films, magazines and books which portray or depict explicit sexual activities as well as sexually oriented paraphernalia. In addition, videotapes can be rented and viewed on the premises. These materials are available to adults only. (Stipulation of Facts 10 and 11).

II.

The Airline Bookstore is subject to the zoning ordinance at issue as an Adult Book/Video store. (Stipulation of Facts 10; Petition for Writ of *Certiorari*, p. 2).

III.

The Airline Bookstore was located within 1,000 feet of a residence and a residential zone. (Stipulation of Facts 19).

IV.

The areas within City of Kenner Light and Heavy Industrial zones in which an Adult Book/Video store may be located are not objectively "small." They consist of 357.07 acres of developed land, or 3.9 percent of the total area of the City, and 140 acres of presently undeveloped land, or 1.5 percent of the total area of the City.

V.

The City of Kenner's expert realtor, did not "eliminate" Light and Heavy Industrial areas south of the New Orleans International Airport as available for location of an Adult Book/Video store. His stipulated testimony

was that "[t]hose squares to the southwest of the New Orleans International Airport, that meet the criteria of the laws, are improved predominately with large warehouses that provide storage space for airport related activities. While there are several smaller office-warehouse type buildings, a greater preponderance of the improvements would not be realistically suitable for adult book/video store use. There is, however, an area of undeveloped land that is subdivided with dedicated streets that could eventually be available to such use. Access to this area is from Airline Highway." (Stipulation of Facts 24, Exhibit 15 at p. 1).

VI.

Available areas for operation of an Adult Book/Video store in Light and Heavy Industrial zones in the City of Kenner north of the New Orleans International Airport, though arguably "unsuited to a retail use such as a bookstore or a video rental establishment," (Stipulated testimony of Mr. Michael W. Truax, Petitioner's expert real estate broker/agent), are "feasible for adult book/video store use. . . . Adult book/video stores offer products and activities that would be considered specialty items and therefore, location, visibility and access are not as important as they would be for a bookstore or other retail outlet. Products offered are generally not sought out by competitive pricing or quality shopping, and therefore, above factors have no effect on the feasibility of such use in areas examined." (Stipulated testimony of Mr. Albert V. Eason, Respondents' expert realtor.)

SUMMARY OF ARGUMENT

This Court has previously upheld zoning ordinances restricting operation of adult businesses within 1000 feet of

a residential district. Because the City of Kenner does not have a central commercial or business district, but rather is a suburban, bedroom community of New Orleans, its desire to preserve the quality of urban life by precluding adult businesses from locating near residential districts or family-type commercial areas required limiting such businesses to Light and Heavy Industrial districts. Petitioner also complains that the ordinance forced it to relocate after a number of years at its prior location. Ordinances requiring amortization have previously been upheld and Petitioner cites no authority or rationale for its suggestion that the number of years a business has operated at a location is a relevant factor to be considered when the constitutionality of an otherwise permissible time, place and manner zoning restriction is challenged.

The evidence relied on by the City of Kenner in passing its ordinance concerning the secondary effects of adult oriented businesses was clearly sufficient to meet the criteria this Court established in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). In addition, although Petitioner complains of combined distance and concentration regulations, it does not establish, on the stipulated facts, that the ordinance does not meet the *City of Renton* requirement that Petitioner be provided a reasonable opportunity to operate an adult bookstore in the City of Kenner.

Petitioner also fails to demonstrate error in the District Court's conclusion that "any available sites" satisfies the test of alternative avenues of communication in this case. The District Court based this conclusion on the stipulated evidence that the ordinance permits operation of an adult book/video store in four areas, with a number of sites within each area. These available sites satisfy the requirement that alternative avenues of communication be

provided for adult book/video businesses.

Ordinance No. 6333, adopted by the City of Kenner, does not allow petitioner's adult bookstore to continue to operate in the Special Industrial district in which it was located because that district is within 1000 feet of a residential neighborhood, as are all districts classified Special Industrial. Thus, relocation to Light Industrial or Heavy Industrial districts was required to accomplish Kenner's purpose of preserving neighborhoods and commercial districts. The ordinance is only as broad as it needed to be.

REASONS FOR DENYING WRIT OF *CERTIORARI*

The District Court decision as affirmed by the United States Court of Appeals for the Fifth Circuit does not raise issues of a character which fulfill the requirements of Rule 10, Rules of the Supreme Court of the United States, with the exception of the issue addressed in the Cross Petition for Writ of *Certiorari*. These decisions resolved the First Amendment issues addressed by Petitioner on grounds that in no way conflict with applicable decisions of this Court or decisions of other courts.

I
THIS COURT'S CASES ESTABLISH CLEAR LEGAL STANDARDS APPLICABLE TO ZONING OF BUSINESSES DISTRIBUTING SEXUAL MATERIALS ON ALL ISSUES ADDRESSED BY PETITIONER

PETITIONER'S POINTS I, IV AND V

In *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), this Court